IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1148

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of Mario Lalli, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

HENKIN AND HENKIN
Attorneys for Appellant
22 West 1st Street
Mount Vernon, N. Y. 10550
(914) 668-2300

Of Counsel:

LEONARD M. HENKIN
MORRIS R. HENKIN

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Citations

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals, State of New York, entered on November 25, 1975, affirming the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates, Powers and Trusts Law § 4-1.2 is constitutional and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinion Below

The opinion of the Court of Appeals of New York is reported at —— N.Y. —— (Appendix A). The opinion of the Surrogate's Court of Westchester County is not reported. (Appendix B)

Jurisdiction

This proceeding was commenced in the Surrogate's Court of Westchester County for a compulsory accounting by administratrix-widow on behalf of his sister and himself by decedent's son, who was born out of wedlock, without an order of filiation being granted within two years after birth and who was acknowledged as son by the decedent in a writing acknowledged before a notary and partially supported by the decedent during his lifetime. The Surrogate dismissed the proceeding and adjudged that the statute, Estates, Powers and Trusts Law § 4-1.2, denying the appellant the right to inherit from his father is constitutional. (Appendix B) On a direct appeal to Court of Appeals of New York on constitutional grounds, the decree of Surrogate Court was affirmed.

The judgment of the Court of Appeals of New York was entered on November 25, 1975. (*Department of Banking* v. *Pink* (1942), 317 U.S. 264, 267-268; *Cole* v. *Violette,* (1943), 319 U.S. 581). Notice of Appeal was filed in the Surrogate's Court, Westchester County on January 23, 1976. The jurisdiction of the United States Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Stanton* v. *Stanton* (1975), 421 U.S. 7; *Reed* v. *Reed* (1971), 404 U.S. 71; *Labine* v. *Vincent* (1971), 401 U.S. 532; *Demorest* v. *City Bank Farmers Trust Co.* (1943), 321 U.S. 36.

Statute Involved

Estates, Powers and Trusts Law § 4.1-2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§ 4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Other Material Statutes

It is the juxtaposition of the above quoted statute with the other pertinent statutes, reflecting the public policy of New York that points up the discrimination complained of. Those statutes are:

1. Estates, Powers and Trusts Law § 5-4.4, 17B, McKinney's Consolidated Laws of New York, 932, as amended by 1975-1976 Pocket Part, page 146:

§ 5-4.4 *Distribution of damages recovered*

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

2. Estates, Powers and Trusts Law § 4-1.1, 17B, McKinney's Consolidated Laws of New York, 476-477, as amended by 1975-1976 Pocket Part, pages 70-71:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

(1) A spouse and children or their issue, money or personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

(2) A spouse and only one child, or a spouse and only the issue of one deceased child, money or personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes.

(3) A spouse and both parents, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to

the parents. If there is no surviving spouse, the whole to the parents.

(4) A spouse and one parent, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parent. If there is no surviving spouse, the whole to the parent.

(5) A spouse, and no issue or parent, the whole to the spouse.

(6) Issue, and no spouse, the whole to the issue per stirpes.

(7) Brothers or sisters or their issue, and no spouse, issue or parent, the whole to the brothers or sisters or to their issue per stirpes.

(8) Grandparents only, the whole to the grandparents. If there are no grandparents, the whole to the issue of the grandparents in the nearest degree of kinship to the decedent per capita.

(b) If the distributees of the decedent are in equal degree of kinship to him, their shares are equal.

(c) There is no distribution per stirpes except in the case of the decedent's issue, brothers or sisters and the issue of brothers or sisters.

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(e) Distributees of the decedent, conceived before his death but born alive thereafter, take as if they were born in his lifetime.

(f) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(g) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(9) Great-grandparents only, the whole to the great-grandparents. If there are no great-grandparents, the whole to the issue of great-grandparents in the nearest degree of kinship to the decedent per capita. Provided that in the case of a decedent who is survived by great-grandparents only, or the issue of great-grandparents only, such great-grandparents or the issue of such great-grandparents shall not be entitled to inherit from the decedent unless the decedent was at the time of his death an infant or an adjudged incompetent. Provided, further, that this subparagraph nine shall be applicable only to the estates of persons dying on or after its effective date.

3. Family Court Act § 517, 29A, Part 1, McKinney's Consolidated Laws of New York, 249:

§ 517. *Time for instituting proceedings*

(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support.

(b) If the petitioner is a public welfare official, the proceeding may be originated not more than ten years after the birth of the child.

4. Family Court Act § 417, 29A, Part 1, McKinney's Consolidated Laws of New York, 146:

§ 417. *Child of ceremonial marriage*

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.

5. Domestic Relations Law § 24, 14, McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part, 28:

§ 24. *Effect of marriage on legitimacy of children*

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument

executed before the time this act shall take effect or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

Question Presented

Does Estates Powers and Trusts Law § 4-1.2 providing that an illegitimate child is the legitimate child of his father only if an order of filiation is issued in a proceeding instituted in the lifetime of the father during pregnancy of the mother or within two years from the birth of a child in juxtaposition with other pertinent statutes reflecting public policy of New York violate Equal Protection and Due Process Clauses of Amendment XIV to the Constitution of the United States, in its application to a child born out of wedlock, for whom no order of filiation was entered and who was acknowledged by the deceased father as his son in a writing acknowledged before a notary and partially supported by him, by preventing such child from sharing in his father's intestate estate or proceeds of recovery in a wrongful death action against the confessed murderer of his father?

Statement

The decedent, Mario Lalli, was murdered on January 7, 1974 by one William Simpson, also known as William Lalli. He was married to Rosamond Lalli, the administratrix and appellee, about 34 years. Robert M. Lalli, the appellant, and his sister, Maureen Lalli were born respectively on August 24, 1948 and March 19, 1950, to the decedent and Eileen Lalli, who predeceased him. Robert M. Lalli, the appellant, was acknowledged by the decedent in a writing duly acknowledged before a notary and was supported by the decedent, who even bought a house "for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting."

There are no factual disputes. The appellant, Robert M. Lalli, and his sister, Maureen Lalli are natural children, born out of wedlock, and no order of filiation was ever entered.

On August 26, 1974 Robert M. Lalli, the appellant, filed a petition seeking a compulsory accounting and although the appellee originally answered, she thereafter served a notice of motion to dismiss on October 1, 1974 on the ground that under Estates, Powers and Trusts Law § 4-1.2 the appellant was not a distributee. The appellant opposed the application on the ground that the statute violated Equal Protection and Due Process Clauses of the XIVth Amendment and New York State Constitution, thus raising the federal question sought to be reviewed. The Surrogate granted the motion upholding the statute by the decree entered November 26, 1974 (Appendix D) and the Court of Appeals affirmed by the final judgment entered November 25, 1975 (Appendix C).

The Federal Questions Are Substantial

The XIV Amendment reads in part as follows:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws • • • "

This Court in *Weber* v. *Aetna Casualty and Surety Co.* (1972), 406 U.S. 164, 172, said by Mr. Justice Powell:

> "• • • The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose • • • The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

It would seem to follow that a statutory classification to be valid must serve some legitimate state purpose, but unfortunately the opinion of the Court of Appeals of New York fails to indicate what that purpose is and limits itself to claiming that there exists a rational basis for the means chosen by the Legislature.

This Court in *Labine* v. *Vincent* (1971), 401 U.S. 532, 537, admitted by Mr. Justice Black:

> "of course it may be said that the rules adopted by the Louisiana legislature 'discriminate' against illegitimates."

But the laws of New York do not discriminate against the illegitimates, only against some of them, as becomes apparent from the juxtaposition of the various statutes of New York. Family Court Act § 417 and Domestic Relations Law § 24 grant full inheritance rights to those illegitimates whose parents at any time before or after their birth

> "• • • entered into a civil or religious marriage, or shall have consummated a common law marriage • • • not withstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void."

The Court of Appeals completely ignored the fact that the same "state of knowledge in the field of genetics" would pose the identical problem as to father's identity of a previously born child of a later void or voidable marriage as well as a child whose parents did not commit a bigamy by contracting such a marriage; yet the New York legislature would grant the right to inherit to the first and deny the same right to the appellant.

The second ground to justify the discrimination urged by the Court of Appeals is "practical problems and difficulties associated with proof of fatherhood" but this court in *Jimenez* v. *Weinberger* (1974), 417 U.S. 628, 636, completely disposed of such claims saying by Mr. Chief Justice Burger:

> "It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the pur-

> poses of the Act to conclusively deny them an opportunity to establish their dependency • • • and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses."

Furthermore we are not dealing here with any questions of proof, for it is undisputed that the appellant was acknowledged by the decedent as his son in writing duly acknowledged before a notary and supported by the decedent and as to such Mr. Justice Brennan in a dissenting opinion joined by Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall said in *Labine* v. *Vincent* (1971), 401 U.S. 532, 547:

> "In so far as they treat illegitimate children whose fathers publicly acknowledged them differently from legitimate children, plainly violate the Equal Protection Clause."

Even the New York legislature recognized that there exists no reason for discrimination against an acknowledged and supported illegitimate child for in Family Court Act § 517 it limited the time to institute paternity proceedings to period of pregnancy and two years after birth, "unless paternity has been acknowledged by the father in writing or by furnishing support." And in our case we have both. In *Shapiro* v. *Thompson* (1969), 394 U.S. 618, in ruling invalid certain "one year residency" requirements, this Court stated that the effect of such regulations was to create "two classes of needy resident families indistinguishable from each other" and that "any classification • • • unless shown to be necessary to promote a compelling governmental interest is unconstitutional." In *Dunn* v. *Blumstein* (1972), 405 U.S. 330, 347, Mr. Justice Marshall said:

> "If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as 'necessary' to achieve the same purpose."

Having determined that proof of either acknowledgement in writing or support was sufficient to lift the bar on paternity, the State could not require necessity of other proof to "achieve the same purpose." As to the argument of the Court of Appeals as to presumed intention of the decedent, the best answer is to be found in the words of Mr. Justice Brennan in his dissent in *Labine* v. *Vincent* (1971), 401 U.S. 532, 556:

> "Moreover logic and common experience suggest that a father who has publicly acknowledged his illegitimate child will not generally intend to disinherit his child • • • All the writings cited to us • • • suggest precisely the opposite conclusion."

While in *Labine* v. *Vincent* (1971), 401 U.S. 532, this Court upheld the laws of Louisiana which discriminated against all illegitimates as reflecting "in major part traditional deference to a state prerogative to regulate the disposition at death of property within its borders" as said by Mr. Justice Powell in *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 170, at least it could be claimed that such discrimination served a State purpose to encourage marriage and discourage indiscriminate liaison but what State purpose can be claimed to be served by the laws

of New York as they do not discriminate against all illegitimates, but only against some of them, for *In Estate of Macklin* (1975), 82 M (2) 376, 371 N.Y.S. (2) 245, Surrogate Di Falco of New York County in commenting on Domestic Relations Law § 24 said: "The purpose of the legislation • • • was to treat the common law marriage, which may have been otherwise void because of an impediment, in the same way as they were treating with a civil or religious marriage that may have been void because of impediment."

In other words the only apparent State purpose for this discrimination among the illegitimates is to encourage criminal behavior for if the natural parents of Robert M. Lalli committed bigamy at any time before or after his birth then he would be entitled to share in the estate of his natural father under Domestic Relations Law § 24 and Family Court Act § 417. Accordingly the greater rascal the father, the better for the children. But this is rank discrimination without any reason or state objective.

In final analysis, it is respectfully submitted, that there is absolutely no rhyme or reason for the attempted classification and that as rights of many children born out of wedlock are involved particularly in these days of easier divorce laws, and experimental living together without benefit of clergy and recognition that it is invidious to discriminate against illegitimates "when no action, conduct or demeanor of theirs is possibly relevant • • •" (*Levy* v. *Louisiana* (1968), 391 U.S. 68, 72) this case presents substantial federal questions as to right to disinherit.

In addition the attempted classification is based on sex, for while an illegitimate child is granted full inheritance

rights from his mother, such child can get same rights from his father only on certain proviso and conditions, which makes same suspect and unconstitutional. *Stanton* v. *Stanton* (1975), 421 U.S. 7; *Frontiero* v. *Richardson* (1973), 411 U.S. 677; *Stanley* v. *State of Illinois* (1972), 405 U.S. 645; *Reed* v. *Reed* (1971), 404 U.S. 71.

Finally the appellant, having been supported by the decedent at the time of his death, had a right to participate in the proceeds of an action for wrongful death against the murderer and the administratrix had a duty to proceed with such an action and account to the appellant for same. *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164; *Glona* v. *American Guarantee & Liability Insurance Company* (1968), 391 U.S. 73; *Levy* v. *Louisiana* (1968), 391 U.S. 68.

CONCLUSION

For the reasons stated, appellant respectfully submits that the questions presented on this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

HENKIN AND HENKIN
Counsel for Appellant

Of Counsel:

LEONARD M. HENKIN
MORRIS R. HENKIN

APPENDICES

APPENDIX A

Opinion of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Surr. Ct. No. 440

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased,

ROBERT M. LALLI,

Appellant,

—v.—

ROSAMOND LALLI, as Administratrix &c.,

Respondent.

(440)

HENKIN AND HENKIN
Mt. Vernon
(LEONARD M. HENKIN of counsel)
for appellant.

AVSTREIH, MARTINO & WEISS
Mt. Vernon
(LEONARD A. WEISS of counsel)
for respondent.

JONES, J.

We hold that Section 4-1.2(a)(2) of the Estates, Powers and Trusts Law is not unconstitutional to the extent that it prescribes the entry during the father's lifetime of an order of filiation declaring paternity as a condition precedent for inheritance by an illegitimate child from his or her father.

In this case an illegitimate son, over 25 years of age at the time of his father's death, sought an order in Surrogate's Court for a compulsory accounting by the administratrix of his deceased father's estate. The administratrix, the decedent's widow, moved to dismiss the son's application on the ground that he was not a distributee and hence had no standing to compel an accounting.

The facts are undisputed. Appellant and his sister were the natural son and daughter of the decedent, having been born on August 24, 1948 and March 19, 1950, respectively. Respondent administratrix had been married to the decedent for some 34 years prior to the decedent's death on January 7, 1973, during which time the decedent and she had resided together as husband and wife. The natural mother of appellant and his sister had died on October 11, 1968. It was not contested that during his lifetime the decedent had provided financial support for both appellant and

his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public. It is agreed, however, that there was never any order of filiation.

The Surrogate granted respondent's motion to dismiss the application for a compulsory accounting on the ground that appellant was not a distributee under EPTL 4-1.2 (a)(2). In so doing the Surrogate rejected appellant's contention that § 4-1.2(a)(2) is unconstitutional. On direct appeal pursuant to CPLR 5601(b)(2) we affirm.

Section 4-1.2, bearing the heading, "Inheritance by or from illegitimate persons", provides in pertinent part:

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

• • •

Appellant's assault on § 4-1.2(a)(2) is grounded in contentions that its provisions deny him the equal protection of the law assured him under State and federal constitutions and the due process of law to which he is entitled under the federal constitution. In disposing of his challenge we address three aspects of asserted constitutional infirmity: first, the difference in proof of parenthood necessary to establish the right of inheritance from a natural father as contrasted with the proof required to establish the right of inheritance from a natural mother; second, the insistence that there be an order of filiation; and third, insistence that the order of filiation be made during the lifetime of the natural father.[1]

At the threshold we recognize a material distinction between benefits and rights to which an illegitimate child is entitled in consequence of the fact that he or she is the child of his or her parent on the one hand, and, on the other, expectations only to which such a child may look forward in consequence of a child-parent relationship. The former category includes entitlement to the proceeds of a wrong-

[1] Since this appellant's claim to status as a distributee is foreclosed by the provision of § 4-1.2(a)(2) that the order of filiation must be made during the lifetime of the natural father, a provision the constitutionality of which we here uphold, we do not reach the challenge addressed to the separate provision of the statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (§ 4-1.2[a][2]). We intimate no views with reference to the asserted unconstitutionality of that provision.

ful death action (*Levy* v. *Louisiana*, 391 US 68; cf. *Glona* v. *American Guaranty Co.*, 391 US 73); to workmen's compensation benefits (*Weber* v. *Aetna Cas. & Surety Co.*, 406 US 164); to financial support from a father (*Gomez* v. *Perez*, 409 US 535); to social security benefits (*Jimenez* v. *Weinberger*, 417 US 628). In such cases the applicable standard for review as to constitutionality is that sometimes labeled strict scrutiny (a compelling state interest in the objective sought and the least restrictive means for achieving that objective [cf. *Montgomery* v. *Daniels*, —— NY2d ——, ——]).

As appellant concedes, however, the test in the present instance (involving only an inchoate expectancy at best) is whether there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible state objective. (*Labine* v. *Vincent*, 401 US 532; cf. *Montgomery* v. *Daniels*, *supra*, p. —). We have no difficulty in concluding under this less stringent test that there is a reasonable basis for each of the three distinctions which the Legislature has prescribed and which appellant attacks.

In the first place, given the state of our present knowledge in the field of genetics, it cannot be gainsaid that the identification of a natural mother is both easier and far more conclusive than the identification of a natural father. It may be one day that, notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood. Clearly such proof is not available today. In this circumstance we conclude that the Legislature acted rationally in prescribing a specially defined procedure for establishing the fact of father-

hood. Once that fact is established in the formal manner required by the statute, the right of an illegitimate child to inherit from his father is the same as his right to inherit from his mother, and exactly the same as if he had been born in wedlock. There is no discrimination against illegitimacy. The difference exists only with respect to the means by which the fact of fatherhood is to be established, and then for sound and understandable reasons.

Secondly, we cannot say in the face of practical problems and difficulties associated with proof of fatherhood that it is irrational to require the formality of a court order adjudicating the fact of paternity. We recognize, of course, that in particular instances, a duly acknowledged written statement of paternity, or conclusive proof of substantial and continuous financial support may be very compelling. But even in such instances, under familiar principles an apparent admission of paternity may be negated by proof of misrepresentation, fraud, duress or other vitiating circumstance. To require the formality and conclusiveness of a judicial determination is not irrational.

Finally, we conclude that it was not irrational, either, to lay it down as a condition precedent that the order of filiation must be made during the lifetime of the natural father. The father may be expected to have greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process. Beyond that, and perhaps even more important, by their very nature the statutes of descent and distribution serve as an expression of the presumed intention of the deceased for the distribution of his property on his death, absent any

effective testamentary or *inter vivos* disposition. No one questions that a natural father may disinherit his son notwithstanding that the fact of fatherhood has been conclusively established in a paternity proceeding; he has only duly to execute a will appropriate for that purpose. Similarly a father may effectively provide for the distribution of all or any part of his property to an illegitimate child notwithstanding that there has been no order of filiation. Since, then, the ultimate question of whether a son shall inherit lies within the volitional determination of the father, it is not unreasonable to require in addition to a highly reliable standard of proof of parenthood, that the alleged father have personal opportunity to participate, if he chooses, in the procedure by which the fact of his fatherhood is established.

Accordingly the decree of Surrogate's Court, Westchester County, should be affirmed.

• • • • •

Decree affirmed, with costs. Opinion by Jones, J. All concur.

Decided November 25, 1975

APPENDIX B

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BREWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

> "But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.
>
> • • • • •
>
> "It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

> ". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)
>
> "The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.
>
> "The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)
>
> "Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> ". . . There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX C

Order of Affirmance of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES D. BREITEL,
Chief Judge, Presiding.

JOSEPH W. BELLACOSA, *Clerk*

REMITTITUR November 25, 1975.

SURROGATE'S COURT

No. .....

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased.

(ROBERT M. LALLI, *Appellant;* ROSAMOND LALLI, as Administratrix &c., *Respondent.*)

BE IT REMEMBERED, That on the 13th day of January in the year of our Lord one thousand nine hundred and seventy-five Robert M. Lalli, the appellant in this cause,

came here unto the Court of Appeals, by Henkin, Henkin & Quinn, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the decree of the Surrogate Court, Westchester County. And Rosamond Lalli, the respondent in said cause, afterwards appeared in said Court of Appeals by Muriel Lawrence, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leonard M. Henkin of counsel for the appellant, and by Mr. Leonard A. Weiss of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the decree of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

Opinion by Jones, J.

All concur.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate Court, Westchester County there to be proceeded upon according to law.

THEREFORE, it is considered that the said decree is affirmed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate Court, Westchester County before the Surrogate thereof, according to the form of the statute in such case made and provided, to be en-

forced according to law, and which record now remains in the said Surrogate Court before the Surrogate thereof, &c.

JOSEPH W. BELLACOSA
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 25, 1975.

[Seal]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

JOSEPH W. BELLACOSA, *Clerk.*

APPENDIX D

Decree of Surrogate's Court Westchester County

At the Surrogate's Court, held in and for the County of Westchester, at the County Courthouse, White Plains, New York, on the 26th day of November 1974.

Present:

HON. EVANS V. BREWSTER,

Surrogate.

Index #1760/73

In the Matter of the Petition of ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the estate of Mario Lalli, deceased, to render and settle her accounts as such Administratrix.

ROBERT M. LALLI, residing at 135 Daisy Farm Drive, in the City of New Rochelle, County of Westchester, State of New York, having petitioned the Surrogate's Court of the County of Westchester to compel Rosamond Lalli, Administratrix of the goods, chattels and credits of Mario Lalli, deceased, who at the time of his death resided at 415 Gramatan Avenue, in the City of Mount Vernon, County of Westchester, to render and settle her account as such Administratrix, by a petition duly verified August 23, 1974, and a citation having duly issued thereon returnable on the 20th day of September, 1974, and said Rosamond Lalli having answered said petition by an answer duly verified September 16th, 1974, and having thereafter moved by a

notice of motion dated October 1, 1974, supported by the affidavit of Rosamond Lalli sworn to October 1, 1974, to dismiss the petition of said Robert Lalli on the ground that neither Robert Lalli nor his sister, Maureen Lalli, are distributees of decedent's estate under provisions of EPTL 4-1.2 and the petitioner having submitted an affidavit sworn to October 10, 1974, together with exhibits thereto attached, and affidavit of Rosetta Vollmer Ammirata sworn to October 10, 1974, in opposition thereto, and said Rosamond Lalli having submitted a reply affidavit sworn to October 23, 1974, and said application having come up to be heard on the 25th day of October, 1974, and after hearing Muriel Lawrence, Esq., attorney for the respondent, in support of the application, and Henkin, Henkin and Quinn, Esqs. (Leonard M. Henkin, Esq. of counsel), attorneys for the petitioner, in opposition thereto, and upon reading all of the aforesaid and due deliberation having been had, and the Surrogate having rendered a decision dated November 15, 1974, sustaining the constitutionality of EPTL 4-1.2 in its application to the petitioner and his sister herein, as against their claim that said section is unconstitutional, in application to them

Now, it is

ORDERED, ADJUDGED AND DECREED, that EPTL 4-1.2 is constitutional as applicable to the petitioner herein, and that by reason thereof petitioner is not a distributee of the decedent herein and that he lacks status to petition for compulsory accounting by the Administratrix, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition herein be and the same is hereby dismissed.

EVANS V. BREWSTER
Surrogate

APPENDIX E

Notice of Appeal to United States Supreme Court

SURROGATE'S COURT

WESTCHESTER COUNTY

No. 440

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

To Compel ROSAMOND LALLI; as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

To render and settle her account as such Administratrix.

NOTICE is hereby given that ROBERT M. LALLI, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals, State of New York, affirming the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates Powers and Trusts Law §4-1.2 is constitutional, entered on November 25, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

HENKIN AND HENKIN
Attorneys for Appellant
22 West First Stret
Mount Vernon, New York 10550
(914) 668-2300

FILED
SURROGATE'S COURT
JAN 23 1976
WESTCHESTER COUNTY
CLERK

STATE OF NEW YORK,
COUNTY OF WESTCHESTER,
SURROGATE'S OFFICE, *ss.*:

I, PHILIP E. PUGSLEY, Chief Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of Notice of Appeal, Re: The Estate of Mario Lalli, Deceased. Filed: January 23, 1976 with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original.

Dated and Sealed January 23, 1976

PHILIP E. PUGSLEY
Chief Clerk of the Surrogate's Court

[SEAL]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, *ss.*:

BONNIE WADWICK being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 415 Gramatan Avenue, Mount Vernon, N. Y.

On January 23, 1976 deponent served the within Notice of Appeal upon Avstreih, Martino & Weiss, Esqs. & Muriel Lawrence, Esq. substituted on appeal & original attorneys for Respondent in this proceeding, respectively, at 20 East 1st Street and 19 Gramatan Avenue, Mount Vernon, New York 10550, the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

BONNIE WADWICK

Sworn to before me on
January 23, 1976

MORRIS R. HENKIN
Notary Public, State of New York
No. 60-6853350
Qualified in Westchester County
Commission Expires March 30, 1976